Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

COMPETITIVE CABLE ASSOCIATION

Comments

COMPETITIVE CABLE ASSOCIATION

Sol Schildhause, Esq.
Farrow, Schildhause & Wilson
1400 16th St., N.W., Suite 501
Washington, D.C. 20036
(202) 328-1800

Its Attorneys

January 19, 1993

SUMMARY

The Competitive Cable Association agrees with the Congressional assessment that opening up cable programming to other exhibitors is "crucial" to the development of competition to cable. The Association contends for not confining the contemplation of vertically integrated relationships to ownership overlap. In the Association's view, control over and undue influence in the distribution of program product should be the test. In that context, just about all of cable's networks should be available to the competitive exhibitor.

The Association next urges that the enforcement procedures be kept simple. It reminds that those proposing to compete arrive at the process with thinner resources against competition that has a long lead. The Commission is asked to establish a process that would declare that a verified unwillingness to sell will create a presumption of unfairness and shift the burden to the defendants of demonstrating compliance with the Cable Act. The Commission's proposals for dispute resolution will breed delay, in the Association's view. The Commission is urged to itself take on the management of the proceeding, to direct discovery and to take depositions. Leaving it to ordinary adversarial mechanics will allow the resolution of disputes to turn on superior resources and superior lawyering, an outcome that will not serve the public interest in removing the roadblocks to competition.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

COMPETITIVE CABLE ASSOCIATION

Comments

The Competitive Cable Association now responds to the Commission's invitation to comment on its proposals in the captioned proceeding. The Association--also sometimes referred to as CCA--represents alternate providers of video and audio distribution services. It is wide open to membership by wireless cable operators, telephone companies, second or competitive wired cable systems, ITFS arrangements, SMATV installations, 28 GHz proponents, and other distributors, no matter the technology.

Cable Act Identifies Principal Impediments to Competition

The 1992 Cable Act, for all its regulatory overkill in other areas, has at least identified and made advances on the

principal cable practices that have been discouraging competition. Making it difficult to get into the cable business has now been targeted--franchising authorities are prohibited from granting exclusive franchises and from unreasonably refusing to award competing authorizations; the practice of reducing subscriber rates in a portion of a franchise area in order to undercut a competitor just getting started in that portion is diminished by the uniform pricing requirement of the new Act; and making available to the competition a process for getting access to programming should, if meaningfully enforced, help to even out the marketplace.

Access to Programming is Crucial to development of Competition

Defending against competition in cable customarily takes the form of either cutting subscriber rates or tying up desirable programming, or a combination of both. Price-cutting as an anti-competitive device is perhaps becoming increasingly adventurous--the new Act insists on uniform pricing and, as before, predatory pricing will continue to attract antitrust attention. Now, the institutions of government are zeroing in on the business of program suppliers withholding product from a competing video service provider or dealing discriminately so that a first or favored operator is given a program cost edge over the later competitor. The Competitive Cable Association agrees with the Senate committee's view that opening up programming to other exhibitors is "crucial to the development of competition to cable"

(S. Rep. No. 102-92, 102d Cong., 1st Sess. 77 (1991).

The bond between the cable program suppliers and the major cable operators--that has benefitted the American viewing public by generating a host of new cable networks--now has a downside to it. What has been plaguing competition in the cable scene has been the ability of the big multiple system operators to dominate the cable program networks, either by virtue of outright ownership of the network or because their large size, in terms of the subscriber numbers they can deliver, makes them important to the financial future of the network. That influence seems to be at work in a number of communities where movie channels and desirable sports events are being withheld from second cable systems or other alternate video distributors because the earlier system has an existing contract for carriage of those programs.

That connection confronts the newcomer who is undertaking to compete in a market where a major MSO is operating. The latter's clout with the cable networks is turning out to be sufficient to assure that the second operator will have to try to compete without being able to offer the cable programming that viewers demand and will pay for. It is clear that something other than expectable marketing is at work when the program services that used to beg for subscribers now declare that they won't do business with the latecomer.

Those favoring things as they are will contend that the business of selling an exclusive to one exhibitor and withholding product from another--even though the competing exhibitor is most

likely a small operator, a little guy in this big-money game--is just the good, old-fashioned entrepreneurial system at work. It's the way businesses compete, it is said; the system is designed, it is argued, so that the successful, because they are big or creative or whatever, may prevail. The argument, it is here believed, misconceives the way competition is supposed to work in a free society. The system, in fact, is meant to permit and to encourage competition. But the second exhibitor cannot compete. He cannot get the desired cable network even if he wants to outbid the first. Outbidding your competitor, it is submitted, <u>is</u> basic, American free enterprise. But, the second operator is precluded from doing that because the first exhibitor is involved in ownership of, or in financial or other arrangements with, the principal program suppliers.

There are, then, two conflicting considerations at work in this sphere. Exclusivity in marketing is an undeniable inducement to creativity, to the invention of new programming. And that's a desirable. On the other hand, competition in local video exhibition must be encouraged if the marketplace is to be relied on (as Congress has directed in §2(b)(2) of the new Act) to curb the familiar abuses that result from monopoly operation. And that means, for the vital near-term, sharing the fruits of creativity. The Competitive Cable Association believes that reasonable accommodation of these considerations must somehow be carved out, and offers the following.

Cable Act does not Restrict "Attributable Interest" to Ownership Interest

Initially, it is observed that the conventional view is not mandated that only program services in which a cable operator has an equity or ownership interest is embraced by the requirements of the new §628 of the Communications Act. "Attributable interest" is the operative standard which defines the relationship between program supplier and cable operator that is being searched out in the new legislation. But "attributable interest" is not fixed in the Act and, in fact, seems to have been meant to be interchangeable with "affiliated" (S. Rep. No. 102-92, supra, at 27) and "unaffiliated" (e.g., 1992 Cable Act, at (c)(2)(A) of new §628 of the Communications Act). And the Commission itself, asks (Notice, ¶9) whether it should look beyond ownership interest and use "some other attribution standard." It would appear, from the legislative history, that it was intended that the Commission have that choice. (See, again, S. Rep. No. 102-92, supra, at 78--"...it is the intent of the Committee that the FCC use the attribution criteria set forth in 47 C.F.R. Section 73.3555 (notes) or other criteria the FCC may deem appropriate").

"Attributable Interest" has to do with Control; and Customer's Volume of Business is a Controlling Factor

It makes eminent good sense, it is submitted, for the Commission to look beyond ownership connection. Since the inquiry has to do with "whether an entity actually controls another entity"

(Notice, ¶9), there are other marks of relationship that are likely to produce the same results as those that are customarily seen as flowing from the ownership overlap. For example, bond-holdings by one in the other, or any other kind of financial support, or common officers or directors. But, more significant than any of those, perhaps, is the circumstance of size--the behavior of a program supplier, it is suggested, is likely to be influenced by the size of the cable operator and the importance of that size to the economic life of the program product.

Recommended Embrace of "Attributable Interest"

In other words, a multiple system cable operator who can deliver millions of homes nationwide to a program developer has clout with respect to that supplier's product in every community where the MSO operates. This, then, is the rationale for the proposal here by the Competitive Cable Association that "attributable interest" be defined to include a 5% or greater ownership interest, any situation where there are common officers or directors or that is characterized by substantial financial support between supplier and cable operator, and any competitive situation where one of the local cable operations in a competitive situation is owned or controlled by any of the top-100 MSO's (or, alternatively, any MSO that has access to 50,000 or more subscribers nationwide). That kind of measure of control would eliminate the illogic of sorting out the ESPN's, for example, from the TNT's, both of which services are critical to a competing video exhibitor

and are subject to similar marketing taboos and influences.

Procedures for Identifying and Correcting "Undue Influence" in Withholding of Program product should be kept Simple

The Commission's Notice deals, too, with resolving questions of identifying the "undue influence" that persuades a program supplier to withhold product from a local cable operator's competitor, and of targeting pricing and other practices that discriminate or favor one exhibitor over another. The number of questions posed in the Notice hints that final rules will be detailed, complex, and not easily navigable. If that eventuates, it will be a matter of large concern to alternate video exhibitors who, for the most part to date, are not heavy financial players. (Established cable operators, it may appropriately and relevantly be noted, almost never overbuild or otherwise compete with each other in local markets). The Competitive Cable Association looks forward hopefully to simplified rules and streamlined procedures that will not be beyond the limited resources of competing video exhibitors. The Congress, too, looks to "...the least amount of regulation necessary to accomplish...." (S. Rep. No. 102-92, supra, at 68) and to the expectation that "...oversight [by the Commission]...be kept to the minimum necessary to carry out the purposes and policies of the legislation" (Id., at 69). The Association next offers what it believes to be a workable set of principles.

Establish a Set of Presumptions; Refusal to Sell would be Presumed an Unfair Trade Practice

The Commission's Notice, at ¶16, proposes that the resolution of complaints be undertaken by establishing a system of presumptions. The Competitive Cable Association believes that the concept holds promise for simplifying the settlement of disputes and suggests the following practical way around the thicket of process that can otherwise result.

Since it is customarily in the interest of a cable program supplier to make its product as widely available as possible, the unwillingness to sell to another exhibitor in a local market should be a red flag and on its face be presumed an improper trade practice. Any refusal to license a program service to a competing video exhibitor in a local market would be viewed as designed to hurt that competitor. Thus, on a verified complaint by an exhibitor that a cable network is refusing to deal, the Commission would consider that a presumption is created of inappropriately withholding programming in violation of the new Cable Act. The burden would then be deemed to have shifted to the programmer and to its local cable system customer who will, in the circumstance, be the insistent party to claimed market exclusivity. It would be for them to justify the withholding and to demonstrate that there is not a violation of the Act. It is rational, it is believed, to place the burden on the programmer and to the established cable system who, customarily, will have control of or access to documents and to superior resources.

Exception to Presumption for Local Programming created by Cable System

An exception to the scenario would be extended to programming of a purely local nature that is created by a local cable system. For example, a local news show or a local weather channel or a program with special appeal to a local ethnic group would be entitled to the competitive edge and the benefits that flow from exclusivity. This is a discernibly different genre from programming purchased from a supplier who looks to nationwide distribution. These kinds of programs are the essence of the national purpose to encourage creativity and of the Commission's long-standing approval, in the broadcast field, of programming that serves local needs. What the Competitive Cable Association proposes be drawn is a distinction between cable's acting as a program creator and its other function of distributing the material created by others for nationwide distribution. Cable should not have to make available to its competition the fruits of its own creativity. Exclusivity in that case is in order.

Pricing and other Marketing Practices that Discriminate too Diverse; Avoid nuts-and-bolts Rules; leave to Adjudication

The Notice also asks (¶15) for help in spelling out regulations that will identify the pricing and other practices that the Cable Act would consider discriminatory. It is the view of the Competitive Cable Association that the Commission is in a no-man's land in trying to tie down in nuts-and-bolts rules the flood of

variables that confounds regularity in the marketing of video product. The Association expects that the Commission may ultimately have to surrender to that unmanageability and leave to the adjudicatory process the settlement of discrimination complaints. That can be accomplished by a rule that repeats the statutory proscriptions, backing it up in the interest of providing guidance with a recitation (much as in the Notice) of the various features of the problem that will influence the resolution of disputes, and making the complaint process available for the redress of grievance. On verified complaint that makes credible (or *prima facie*) case, the burden of proving the reasonableness of the differences in prices, terms, and practices would, as with refusal to deal and for the same reasons, be placed on the program supplier and its local cable system customer already in place.

Commission Proposals for a Dispute Mechanism will Breed Inordinate Delay; availability of an Efficient Process is Vital to Implementing Access to Programming

The working out of an efficient dispute mechanism is a matter of high concern to the Competitive Cable Association whose members, at one time or another, have been on the receiving end of refusals to deal and other discriminatory practices. The Notice, beginning at ¶38, portrays an enforcement process that, despite its apparent aim to avoid formal hearing, seems not much less disheartening to a complainant who will, it may be expected, be the underdogs in these disputes. Throw in, as the Notice contemplates,

staff status conferences, discovery, ADR (as yet untested), amended complaints, and appeals to the full Commission, and the prospect looms that the complainant may not outlast final resolution of the dispute. The procedure contemplated in the Notice, it is respectfully suggested, has an unfortunate whiff of delay about it, and that will disserve the national interest in getting on with the business of encouraging competition.

Commission should Itself Manage the Process and not let Outcome of Dispute Turn on Superior Resources and Superior Lawyering

The name of the adjudicatory game in these cases ought be to see justice done, not to let superior lawyering carry the day. The Commission's staff should itself manage discovery--that is, order the production of appropriate documents and take depositions, where indicated. And, rulings and decision can be handled at the staff level, much as is the case now with §315 complaints.

In behalf of the Competitive Cable Association, it is politely hoped that the Commission will give due recognition to the unevenness of the competition between the established cable realm and those attempting to break into the monopoly. The core point of the 1992 Cable Act is to encourage and nourish competition. In that setting, the Commission can be expected to respond by indulging those who are trying to edge into this tightly-controlled business. The promise of choice for the American public should be circumstance enough to justify delivering those who would compete

from the ponderous burdens that process-as-usual may be expected to impose.

Respectfully submitted,

COMPETITIVE CABLE ASSOCIATION

By _____
Sol Schildhause

Farrow, Schildhause & Wilson
1400 16th St., N.W., Suite 501
Washington, D.C. 20036
(202) 328-1800

January 19, 1993

Its Attorneys